Courting Disaster: Re-Evaluating Rape Shields in Light of *People v. Bryant*

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Rape shield statutes have always been exceedingly controversial, as they noisily intrude into the already tense debate between victims' and defendants' rights in rape trials. On the one hand, rape is a heinous and violent crime, robbing the victim of dignity and self-respect, and the (often very) public rape trial may strike some as more intrusive than the rape itself. On the other hand, defendants are constitutionally entitled to present a vigorous and zealous defense, particularly in light of the (at least theoretical) prospect of false accusations. Rape shield statutes attempt to strike a balance, but are notoriously inconsistent in treatment across the various states. Using the Kobe Bryant case as a backdrop, this Note argues for the establishment of a Model Code based on current Federal Rule of Evidence 412, but with significant amendment to its current third prong. Rather than the current broad "constitutional catch-all" provision, this Note provides only three constitutional arguments as valid legislative exceptions. Under these revisions, rape trials may become what they have always been intended to be: a vindication of justice through protection of the innocent, whether the innocent is the defendant or the victim.

Th' advent'rous Baron the bright locks admir'd;
He saw, he wish'd, and to the prize aspir'd.
Resolv'd to win, he meditates the way,
By force to ravish, or by fraud betray;
For when success a Lover's toil attends,
Few ask, if fraud or force attain'd his ends.

—Alexander Pope, *The Rape of the Lock*[**]

I. CONFRONTING DISASTER: INTRODUCTION

Star Los Angeles Laker Kobe Bryant exchanged the basketball court for a federal district court and sexual assault prosecution. These charges stemmed from a June 30, 2003, encounter with a nineteen-year-old concierge at the Colorado ski lodge where Bryant was receiving knee treatment. Although details of the encounter differ greatly depending on the source, it

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** Alexander Pope, *The Rape of the Lock*, pt. 1 (Cynthia Wall ed. 1998) (1712).

likely began consensually; at some point, according to Bryant's accuser, the interaction changed from reciprocal to rape.

The Government claimed that Bryant "held her by the back of the neck with his hand during sexual intercourse" while she repeatedly said "no," and that the intercourse was so forceful that the woman bled.[1] Indeed, when police arrested Bryant several hours later, there were still traces of the woman's blood on his t-shirt.[2] Regardless of whether the interaction was consensual or rape, immediate media and public attention ensued: Bryant had long been known for his clean-cut, wholesome image, and had multi-million dollar deals in endorsements with companies such as Nike and McDonald's. He had also been married since 2001, and had a five-month-old child.

The disaster also forced into the public arena a debate regarding "rape shield statutes" that had simmered for over three decades. The legal standards of admissible evidence in rape cases varies wildly depending on the state, and federal law has inspired vehement criticism for its open-ended treatment of admissible evidence. The Supreme Court has added to the problem by remaining mostly silent regarding the constitutionality of rape shield statutes. Into this morass stepped Bryant and his accuser.

On September 9, 2004, District Judge Terry Ruckriegel dismissed the sexual assault charges in *People v. Bryant*, as the accuser had informed prosecutors that she no longer wished to be involved in the case.[3] There are two significant points about this startling choice. First, in a press conference later that day, Bryant confessed that "I recognize now that she did not and does not view this [sexual] incident the same way I did . . . . I now understand how *she feels that she did not consent to this encounter.*"[4] Because Colorado rape law depends on the subjective view of the victim regarding sexual encounters, this statement amounts to a *confession* of guilt.[5]

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[1] The Associated Press, *Bryant's Defense Goes on Offensive*, Oct. 15, 2003, http://msnbc.com/ news/980367.asp?0cv=CA01&cp1=1; *see also* Allison Samuels, *Kobe Off the Court*, NEWSWEEK, Oct. 11, 2003, at 51, *available at* http://msnbc.msn.com/id/3129989/ ("People familiar with the case" said that the rape resulted in "bruises on the neck and vaginal tearing.").

[2] Tom Kenworthy, *Bryant Case Could Hinge on Recording*, USA TODAY, Apr. 9, 2004, at 3A, *available at* http://www.usatoday.com/sports/basketball/nba/2004-04-08-kobe-tape_x.htm.

[3] Gary Tuchman, *Judge Drops Charge Against Bryant*, CNN.COM, Sept. 1, 2004, http://www.cnn.com/2004/LAW/09/01/bryant.trial/.

[4] Peggy Lowe & Charlie Brennan, *I Apologize to Her For My Behavior*, ROCKY MTN. NEWS, Sept. 1, 2004, at A01, *available at* http://www.rockymountainnews.com/drmn/state/article/0,1299,DRMN_21_3155976,00.html (emphasis added).

[5] Davis v. People, 150 P.2d 67, 70 (Colo. 1944) (rape if the sexual act occurs "without the consent or against the will of the victim"); Cortez v. People, 394 P.2d 346, 348 (Colo. 1964) (rape if there is a "lack of consent").

Second, the rationale behind the accuser's decision is highly significant: the case was not dropped because the prosecution thought there was a weak case against Bryant,[6] nor was the case based on a fabrication, as demonstrated by Bryant's statement above. Rather, the woman refused to cooperate because her identity—supposedly sacrosanct in a criminal rape trial—had been plastered all over the internet,[7] along with a detailed recounting of her sexual and psychiatric history,[8] which resulted in "death threats and obscene messages," and the accuser being "stalked by private investigators and hounded by reporters."[9] According to her attorney, the "difficulties the case has imposed on the young woman are unimaginable"—something the judge conceded was "very real"—and the woman felt she could no longer go through the process of the rape trial.[10]

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[6] *See* The Associated Press, *Kobe Prosecutors Were Confident About Case*, MSNBC.COM, Sept. 4, 2004, http://msnbc.msn.com/id/5956015/ (quoting District Attorney Mark Hurlbert) ("There was so much good, credible evidence in this case. There was certainly other evidence that would have been introduced at trial . . . . Bryant's statements have not yet been heard by the public. Her outcry, her demeanor. There was strong evidence, and it was a strong case. Compared to other cases I've won, it stacks up well.").

[7] Although the more reputable media sources have since deleted references to the alleged victim's actual name, numerous websites continue to provide her name and other information, including her home address, phone number, and email address. Talk radio host Tom Leykis was one such source, arguing that his actions were justified because "he doesn't believe 'you can have a fair trial where you know the name of one person and not the other.'" Courttv.com, *Radio Host Defends Having Named Kobe Bryant's Accuser on Air*, July 24, 2003, http:www.courttv.com/people/2003/0724/Bryant_ap.html; *see also* Wikipedia, Katelyn Faber, http://en.wikipedia.org/wiki/Kobe_Bryant%27s_accuser (last visited Nov. 22, 2005).

[8] Sean Kelly, *Blunders Were Par For the Case*, DENVER POST, Sept. 2, 2004, at 7A. In preliminary court hearings, the defense "implied that genital injuries the woman sustained and a DNA analysis show the woman may have had sex with other men after her encounter with Bryant." Sylvia Moreno, *A Different Spotlight for Bryant Accuser*, WASH. POST, Aug. 30, 2004, at A03. The defense also introduced information about the victim's "alleged drug use and two suicide attempts, which they said were efforts to gain attention from a former boyfriend." *Id.* Both suicide attempts occurred four months before she met Bryant. *Id.* According to legal analysts, the defense strategy was to "paint Bryant's accuser as a sexually promiscuous and mentally unstable woman whose credibility is questionable;" the judge in the case "ruled that evidence about the woman's psychological history [could not] be presented at trial," but allowed defense lawyers "to probe the accuser's sexual activity in the three days surrounding her hotel room encounter with Bryant." *Id.*

[9] Moreno, *supra* note 8. Indeed, three men were "arrested for threatening her life." *Id.*

[10] Steve Henson & Lance Pugmire, *Prosecution Drops Charges in Kobe Bryant Rape Case*, L.A. TIMES, Sept. 2, 2004, at A1.

Worse, her identity had been leaked three times *by the court*.[11] After the third leak, the woman's father wrote to the judge that "[m]y family and I have lost trust that we can obtain a fair trial in your court," and the family urged the prosecution to drop the case.[12] Although a civil trial initially continued against Bryant, the civil system offers even less protection for rape victims; the judge ruled that "the public interest" required "open court proceedings," and that the accuser's name would be revealed.[13]

To many, however, the ultimate disaster was not the leaking by the court—as such catastrophic results are hopefully anomalous—but rather that such evidence is admissible *at all* under Colorado's rape shield statutes.[14] Under Colorado law, a victim's sexual history is admissible if the defendant argues that *the evidence is relevant to a material issue in the case*.[15] This infuses the trial court judge with a tremendous amount of discretion, and has

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[11] Kelly, *supra* note 8. The court mistakenly released the alleged victim's name *three* times over a ten month period: on September 16, 2003, "documents revealing the accuser's identity were briefly posted on a state court website." *Id.* Later, in June, "a court reporter mistakenly sent transcripts from closed rape-shield hearings to several media outlets." *Id.* Finally, in July, an order including "the name of the accuser and details indicating the accuser may have had sex with multiple partners in the time around the alleged assault" was mistakenly posted on the court's website. *Id.* According to the judge: "[w]e blew it." *Id.*

[12] David Wharton, *Bryant Prosecutors Seek Delay Amid Signs of Trouble*, L.A. TIMES, Aug. 12, 2004, at A1.

[13] Alicia Coldwell, *Bryant Accuser Must Reveal Name in Lawsuit*, DENVER POST, Oct. 7, 2004, at A1, *available at* http://v.6.denverpost.com/stories/o,1413,36%257E28682%257E2450868,00.html. The judge pointed out that because "the woman's name already has been widely circulated, there would be little benefit in withholding it," neglecting, of course, to mention that the *legal system* was responsible for "widely circulat[ing]" the accuser's name and sexual history. *Id.* However, on March 3, 2005, the parties entered a civil settlement, effectively ending the case. Mark Mullen, *Suit Settlement Ends Bryant Saga*, MSNBC.COM, Mar. 3, 2005, http://www.msnbc.msn.com/id/7019659. Experts believe that the total settlement exceeded $2.5 million, and the settlement included a confidentiality agreement. *Id.* A two-sentence statement was faxed to The Associated Press by Bryant's attorneys, stating that "[t]he parties and their attorneys have agreed that no further comments about the matter can or will be made," and that the matter had been resolved "to the satisfaction of both parties." *Id.*

[14] In other words, under Colorado's current legal standards, *Bryant* is a bad result only because of the public *leaking* of the sexual history information, and not because of its evidentiary *admissibility*.

[15] COLO. REV. STAT. § 18-3-407(2)(e) (1991) ("At the conclusion of the hearing, if the court finds that the evidence proposed to be offered regarding the sexual conduct of the victim or witness is relevant to a material issue to the case, the court shall order that evidence may be introduced and prescribe the nature of the evidence or questions to be permitted. The moving party may then offer evidence pursuant to the order of the court.").

resulted in copious criticism.[16] In *Bryant*, the judge determined that defense attorneys could "probe the accuser's sexual activity in the three days surrounding her hotel room encounter with Bryant" under Colorado's rape laws.[17] The *Bryant* case therefore highlighted a decades-old debate over the admissibility of such sexual history, putting Colorado's rape law on a public stage for national review and inflaming proponents of both sides.

The call for reformation of the rape shield statutes is not a new one.[18] This Note argues for the establishment of a Model Code based on current Federal Rule of Evidence 412.[19] While the first two prongs of the rule remain unchanged, the currently loose third prong is significantly tightened: rather than a broad "constitutional catch-all" provision, my proposal allows only three constitutional arguments as valid legislative exceptions.[20] As a Model Code, states may adopt it into their own legislation.[21]

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[16] *See, e.g.*, Michelle J. Anderson, *Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armor*, 19 CRIM. JUST. 14, 16 (2004) ("These laws grant judges the discretion to admit or bar evidence of a woman's sexual history, and so do not shield victims in any new way.").

[17] Moreno, *supra* note 8.

[18] *See generally* Sherry F. Colb, *"Whodunit" Versus "What Was Done": When to Admit Character Evidence in Criminal Cases*, 79 N.C. L. REV. 939, 939 (2001); John Lausch, Stephens v. Miller*: The Need to Shield Rape Victims, Defend Accused Offenders, and Define a Workable Constitutional Standard*, 90 NW. U. L. REV. 346, 346 (1995); Richard W. Miller III, Stephens v. Miller: *Placing Rape Shield Statutes Between Rock and a Hard Place*, 27 U. TOL. L. REV. 217, 217 (1995).

[19] Federal Rule of Evidence 412(b)(1) allows the following evidence under its rape shield provisions:

> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
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> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
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> (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

FED. R. EVID. 412(b)(1). Of these three prongs, the most problematic is (C), which is facially ambiguous and, according to many, open to limitless interpretations. *See, e.g.*, Anderson, *supra* note 16.

[20] *See* Part V, *infra*.

[21] Because one of the key problems with today's rape shields is the lack of uniformity, this Note proposes a uniform and consistent approach to admitting evidence in rape cases. Of course, federalism concerns are as much an issue today as ever. Establishing the Model Act allows states to adopt and incorporate the Act into their legislatures; any concerns with federalism or enforcement remain outside the scope of this Note. For an analysis of the interplay between the states and federal government

In Part II, this Note examines the historical social response to the act of rape and to rape victims in the pre-rape shield culture. This historical background elucidates the reasons behind and perceived need for the rape shield statutes. Part III investigates the content of the rape shield statutes and describes their four basic categories and distinctions. Next, in Part IV, this Note presents some of the more pertinent criticisms of the statutes, including the most troubling aspect of the rape shield statutes: the potential violation of a defendant's Sixth Amendment right to confrontation. Finally, in Part V, this Note argues that the correct solution is not wholesale repeal of the statutes, but rather a restructuring of Federal Rule of Evidence 412 and tightening of the currently loose "constitutional catch-all" prong.

II. CULTIVATING DISASTER: THE PRE-RAPE SHIELD CULTURE

The pre-rape shield culture and its opinion toward rape victims seem today so archaic and barbaric that one might expect it from a society of three hundred years ago, rather than thirty. Because the academy has so thoroughly investigated and castigated the pre-rape shield culture,[22] I briefly focus on only two aspects: the social perspectives of rape and the effects of these perspectives on rape victims.

A. *Social Perspectives on Rape*

There were two primary perspectives regarding rape before the passage of the rape shield statutes: (1) a woman who lost her virginity was no longer chaste, regardless of whether it occurred consensually or via rape, and (2) rape was *only* considered a wrong because it harmed valuable property.

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concerning the rape shield statutes, see Bradley A. Harsch, *Finding a Sound Commerce Clause Doctrine: Time To Evaluate the Structural Necessity of Federal Legislation*, 31 SETON HALL L. REV. 983, 1021–22 (2001) ("Indeed, for the purposes of federalism, one of the most interesting and distressing features of § 13981 is that the political impetus for the statute did not begin at the federal level but at the state level . . . . Moreover, the numerous states that undertook task force studies did not do so in order to provide a record for VAWA but in order to improve *their own* court systems. Further, forty-six states enacted rape shield laws long before the federal government did so itself.").

[22] *See generally* Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. LEGIS. 125, 126 (1998); Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 914 (1994); Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 763 (1986).

1. *Perspective One: A Maiden No More*

In Thomas Hardy's *Tess of the D'Ubervilles*, Section One introduces Tess as the beautiful—and vastly more important, virginal—heroine, and is titled "The Maiden."[23] Tess is raped at the end of Section One, and Section Two is titled "Maiden No More."[24] In 1891 Britain, virginity was esteemed, and it is therefore small wonder that the end result of a rape was viewed exactly the same as the end result of a voluntary sexual encounter: the woman was a maiden no more, regardless of how it happened.[25]

This nineteenth-century vision of rape and chastity was not unique to England or, indeed, the nineteenth century. In 1958 America, for example, the quality of chastity was prized so highly (and the corresponding vice of unchastity deplored so fiercely[26]) that "the failure of the State to allege previous chastity of the [victim] gives to the defendant the benefit of the defense of her consent and want of resistance on her part."[27] Stunningly, this requirement to allege the victim's chastity was necessary even though she

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[23] THOMAS HARDY, TESS OF THE D'URBERVILLES 1 (1891).

[24] *Id.* at 103.

[25] For a comparison of chastity and rape victims in a Native American context, see Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 121 (2004). In the "Tale of the Raped Maiden," Deer contrasts the aftermath of a rape in Native American society with prototypical Western responses, finding that, in the Native American culture, "this woman becomes revered among her own people, becoming both a medicine woman and a warrior. She is clearly held up to be a strong and powerful woman." *Id.* at 141. Deer explains that this "imagery of the survivor of sexual assault in this story is in *sharp contrast to many widely held Western beliefs about women who have been raped as stigmatized, shamed, or soiled.*" *Id.* (emphasis added). Deer further notes

> the profound shame and embarrassment that stems from an Anglo construction of rape law, in which a virgin is defiled. As noted by one Ojibwa traditional healer, the dominant cultural view is that society needs to protect women because they are weak. As this story and other teachings demonstrate, the "Indian way is to protect women because they are strong."

Id.

[26] A 1950 Virginia statute provided that sexual intercourse could not be considered rape if "the jury shall find that [the victim] was of bad moral repute and also was a lewd female, at and before the time of the alleged offense." VA. CODE ANN. § 18-55.1 (Michie 1950) (cited in Carpenter v. Commonwealth, 71 S.E.2d 377, 382 (Va. 1952)).

[27] Ysac v. State, 91 N.W.2d 49, 51 (Neb. 1958). Though proponents of victims' rights may well deplore the former common law approach to rape trials, defendants' rights advocates may have reason to dislike the past as well; this is because "at common law, in offenses against chastity generally, the testimony of the injured party was sufficient to sustain a conviction, neither a second witness nor corroboration being required." Curry v. State, 74 S.E.2d 249, 250 (Ga. Ct. App. 1953).

"was a girl 15 years of age" and "there was evidence, which was not controverted at the trial, establishing her previous chastity."[28] Chastity was of such importance, evidently, that it was not sufficient to introduce incontrovertible evidence proving an adolescent's virginity; rather, the prosecutor had to state *specifically* that the evidence proved the adolescent's virginity, and had to *explicitly* challenge the defense to disprove it.[29] Modernity has done little to reverse this over-emphasis on chastity: Michigan's current defamation statute states that "words imputing a lack of chastity" are "actionable in themselves and subject the person who uttered or published them to a civil action for the slander."[30]

Interestingly, in 1956 a Kentucky court found that this emphasis on chastity could be overstressed, for while "merely asking the prosecutrix whether she was a virgin, as was done here, is not objectionable. . . . [T]he *emphasizing* of the fact of chastity by *elaborating* the point" was not only unnecessary but "forbidden."[31] The court found that, in rape cases, "there is an initial presumption of [the victim's] chastity" which did not need to be over-stated.[32]

This discrepancy is resolved by analyzing the Eighth Circuit's opinion in *Packineau v. United States*.[33] There, the court found that presumptions of chastity depended both on the rapist's *identity* and on the victim's *character*, finding in "cases where a woman has been set upon and forcibly ravished by *strangers* coming out of ambush or the like . . . any inquiry as to her chastity or lack of it is irrelevant."[34] In *Packineau*, however, the court found an "inquiry as to her chastity" quite relevant, as the victim "had been openly co-habiting with a young man only a few months before . . . ."[35] The court noted that withholding "the tendered proof" that she had "sexual lust and unlawfully indulg[ed] it—is simply to remove actual and real fairness from

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[28] *Id.*

[29] In 1950, another court cited the "complete unanimity in the jurisprudence" that a victim's "want of chastity in rape cases may be shown by evidence of the general reputation of the [victim]." State v. Broussard, 46 So. 2d 48, 50 (La. 1950). In 1946, a court reprimanded an "investigating officer [who] was apparently unaware that the . . . reputation, of a rape-complainant as to chastity in the community in which she lives is of substantial probative value in judging the likelihood of her consent." Hicks v. Hiatt, 64 F. Supp. 238, 243 (M.D. Pa. 1946).

[30] MICH. COMP. LAWS ANN. § 600.2911 (West 2000). *See also* Nehls v. Hillsdale College, 65 F. App'x 984, 990 n.9 (6th Cir. 2003) (discussing *id.*).

[31] Ford v. Commonwealth, 286 S.W.2d 518, 519 (Ky. 1956) (internal citations omitted).

[32] *Id.*

[33] Packineau v. United States, 202 F.2d 681, 686 (8th Cir. 1953).

[34] *Id.* at 685 (emphasis added).

[35] *Id.*

the trial and to reach judgment from mere appearances."[36] In the eyes of the court, the victim was attempting to manipulate the jury using her reputation for chastity; the case is less about protecting the rights of the defendant than it is about punishing a "harlot in virgin clothing."

2. *Perspective Two: A Woman as Property*

The rationale for this protection of the victim's chastity was not out of a sense of compassion or enlightenment regarding female autonomy; rather, women were considered the property of their husbands or fathers, and rape was an evil ultimately because it harmed valuable property.[37] In an era of dowries and paternalism, once one accepts the tenet that women were property, it is perversely logical that rape was an evil not in violating the victim, but only because the man's property had been damaged.[38] While an unmarried virgin was a prize to be won, an unmarried "maiden no more" was sullied property.[39] That rape was thus considered is evidenced in older statutes grouping crimes that destroy or harm property (e.g. robbery, burglary, and arson) with rape.[40]

It is today a matter of course for courts to point out these "antiquated" views of women-as-property in rape discussions.[41] According to the United States Supreme Court, "[n]owhere in the common-law world—in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole

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[36] *Id.* at 686.

[37] *See* United States v. Wiley, 492 F.2d 547, 555 (D.C. Cir. 1973) ("In sum it is said to be the 'male desire to "protect" his "possession" which results in laws designed to protect the male—both the "owner" and the assailant—rather than protecting the physical well-being and freedom of movement of women.'"). The court went on to find that "[t]his point of view, which has been expressed by men as well as women, *may well have some validity*." *Id.* (emphasis added).

[38] *See, e.g.*, People v. De Stefano, 467 N.Y.S.2d 506, 512 (N.Y. County Ct. 1983) ("The [old common] law's then major concern was to protect a father's interest in having a virgin present at the time of marriage in order to safeguard succession rights to landed property.").

[39] *Id.*

[40] *See, e.g.*, 1929 Ind. Acts 54, § 4 (cited in Loftus v. State, 52 N.E.2d 488, 489 (Ind. 1944)).

[41] *See* Shunn v. State, 742 P.2d 775, 777 (Wyo. 1987) ("[T]he woman was considered to be the property of her husband or father . . . . the early rape laws sought compensation for the husband or father, rather than the victim, for the damages incurred to the 'property.'"); Merton v. State, 500 So. 2d 1301, 1303 (Ala. Crim. App. 1986) (referring to "common[]law doctrines that a woman was the property of her husband and that the legal existence of the woman was 'incorporated and consolidated into that of the husband'") (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *430 (1765)).

human being."[42] These statements perhaps ring a bit hollow in light of historical rape jurisprudence, but they at minimum re-emphasize the pre-rape shield culture as one which *did* regard women as "chattel" and which denied the "dignity associated with recognition as a whole human being."[43]

The logical application of women-as-property was not merely that the law compensated the husband of a raped woman, but also that, *necessarily*, a husband could never rape his wife.[44] Lord Hale's explanation of this concept was that "the wife hath given up herself in this kind unto her husband, which she cannot retract."[45] This so-called "marital exemption" from rape lasted well into the twentieth century;[46] the term "marital rape" was not even *mentioned* until 1981, when a New Jersey court held that, after passage of a 1979 New Jersey statute, the fact that "the accused and victim were husband and wife" was no longer a defense to a rape charge.[47] Indeed, "[e]ven as late as 1984, the traditional definition of marriage in New York included the right of a husband to be free of criminal charges for raping his wife. Similar statutes existed in *at least 30 other states*."[48]

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[42] Trammel v. United States, 445 U.S. 40, 52 (1980).

[43] *Id.*

[44] *See, e.g.*, 1 SIR MATTHEW HALE, HISTORY OF PLEAS OF THE CROWN 629 (1800).

[45] *Id.*

[46] *See generally* People v. Meli, 193 N.Y.S. 365, 367 (N.Y. 1922); Sharp v. State, 123 N.E. 161, 161 (Ind. 1919) ("It may be shown as a defense that the woman against whom the offense is alleged to have been committed is the wife of the person who is charged with committing the rape. . . ."); Cunningham v. Cunningham, 48 Pa. Super. 442, 443 (1912) ("That the law imposes upon the wife the duty of permitting her husband to have intercourse with her is established by those cases which hold that a husband cannot be guilty of an actual rape upon his wife, on account of the matrimonial consent which she has given and which she cannot retract.").

[47] State v. Smith, 426 A.2d 38, 39 (N.J. 1981).

[48] People v. Greenleaf, 780 N.Y.S.2d 899, 902 (N.Y. Crim. Ct. 2004) (emphasis added). The seminal case reflecting a judicial shift in philosophy was *People v. Liberta*, 474 N.E.2d 567, 574 (N.Y. 1984). The court held that the

> marital exemption simply does not further marital privacy because this right of privacy protects consensual acts, not violent sexual assaults. Just as a husband cannot invoke a right of marital privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy.

Id.

B. *Effect on Victim*

When Isaac Newton wrote his third law of motion,[49] he was undoubtedly not thinking of rape trials; it is not surprising, however, that the effect of this *action* of social perspective toward chastity and rape was a *reaction* of palpable fear felt by rape victims. The irony, of course, is that after undergoing one of the most heinous experiences imaginable, an entirely new set of rigorous and invasive procedures awaited the victim.

1. *Pre-Trial: Fear to Come Forward*

The first major impact of the historical social perspective on rape is the resultant reluctance and fear on the part of the victim to come forward and report the crime.[50] "Victims who do not report or who delay reporting choose to do so because they fear that no one will believe them, or they may harbor tremendous feelings of embarrassment or guilt about the incident."[51] The emotions of "[f]ear and shame prevent victims from reporting," which results in "no current physical evidence" and makes a successful prosecution even more unlikely.[52]

Further, rape is a unique crime.[53] It has "a particularly psychological dimension. Sex crimes confuse something private and intimate with something criminal, and often cause shame and stigma for the victim greater than that associated with any other crime. Furthermore, the effects are often lifelong."[54] Rape is viewed as a crime vastly different from any other due to its unique nature and disturbing results; rape "is an abomination not because it is an assault on innocence, but because it is an assault on freedom."[55]

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[49] "To every action there is always opposed an equal." ISAAC NEWTON, 1 PRINCIPIA MATHEMATICA PHILOSOPHIAE NATURALIS 13 (Andrew Motte trans., Greenwood Press 1969) (1729).

[50] Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1022 (2004).

[51] *Id.* at 979 n.201.

[52] Joyce R. Lombardi, *Because Sex Crimes Are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 that Permit Propensity Evidence of a Criminal Defendant's Other Sex Offenses*, 34 U. BALT. L. REV. 103, 117 (2004).

[53] *Id.* at 118.

[54] *Id.*

[55] BARBARA TONER, THE FACTS OF RAPE 198 (1977). With regard to *Bryant* in particular, the California National Organization for Women (CANOW) released a statement that "Bryant's attorneys resorted to the lowest acts of victim intimidation and harassment." Cal. Nat'l Org. for Women, *California National Organization for Women*

The unique nature of rape, therefore, tends to create feelings of shame, embarrassment, and guilt for the victim in ways that other crimes do not.[56] Assuming that this is a tenable explanation of rape and distinction from other crimes, it is certainly arguable that rape victims merit special protection, and that public policy dictates differential treatment.[57] This is, of course, specifically what the rape shield statutes were intended to accomplish.[58]

2. *During Trial: Reliving the Rape*

Worse than the initial shame and embarrassment following a rape is arguably the trial itself; ostensibly a vindication of the wrong done to the victim, it often *becomes* a wrong done to the victim.[59] No one disputes that recovering from rape is a daunting task, and the impositions of the legal system in prosecuting sexual crimes often take at least as big a toll on the victim as on the defendant.[60] After the rape, "the legal bad dream begins. In great pain, the rape victim tells of her assault to police, prosecutors, judges, and jurors, but no one believes her. They suspect either that she fabricated a rape from a consensual encounter or that she caused it by her own bad

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Calls Bryant Rape Trial Illustrative of Why So Many Victims of Rape Don't Report It, Sept. 3, 2004, http://www.canow.org/news/press/bryanttrial.pdf. CANOW believes that the "case perfectly illustrates the reasons so many women don't report rape: because of the fear that the trial will traumatize them all over again. . . . You go to the courts looking for compassion and justice and get attacks and humiliation." *Id.*

[56] TONER, *supra* note 55, at 198.

[57] *See* Marah deMuele, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. REV. 145, 146 (2004).

[58] *Id.*

[59] *See* James H. DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1274 n.397 (2004) ("[I]n a recent case in which an accused rapist was arrested thirteen years after the crime, both the victim and accused now face trial, and the sex abuse detective who oversaw the original investigation has expressed his belief that 'there is no victory in this . . . . I don't think there's closure. I think it's reopened closed wounds.'").

[60] *Id.* Indeed,

> some advocates for rape victims worry that prosecuting sexual assault cases years later may force women who have put the past horror behind them to relive their trauma once again. Prosecutors who seek to revive a sexual assault accusation from many years earlier are learning that many victims "have never told their current partners or families of their experience." The criminal justice coordinator for New York City's mayor observed that prosecuting an old rape case means "asking the victim who may have closed the psychological book on the case to open the book . . . . Sometimes it's too painful a thing to ask."

Id. at 1271 (citations omitted).

behavior."[61] It is arguably as intrusive a violation as the physical act, as it forces the victim to put her credibility and character on display for a jury to evaluate.

Although the common phrase that a rape trial puts the victim on trial "has become cliché, the notion is more real than rhetorical."[62] This is because "[j]uries are hyper-critical of a victim's behavior and tend to blame her for the rape itself."[63] Most damning of all is the fact that studies "indicate that the outcome of an average rape trial has more to do with the jury's assessment of the complainant's guilt than its assessment of the defendant's guilt."[64]

Even if the prosecution is successful, rape trials force the victim to relive each moment of the rape in excruciating detail, particularly if her testimony is required.[65] This builds upon and reinforces the first point—the under-reported nature of rape is indicative of a systemic and undeniably real epidemic.[66] Add to this the possibility that the prosecution will *not* be successful, and the dangers of under-reporting become exponentially greater.

III. CREATING DISASTER: PASSAGE OF THE RAPE SHIELD STATUTES

These social perspectives on chastity and rape—and the victim's resultant fear to report the rape—were what the rape shield statutes were designed to address.[67] The rationale behind this legislative activity was a belief that victims require increased protections to prosecute their assailant—and, indeed, to bring charges in the first place.[68] The first rape shield statute was passed in Michigan, and "forty-eight states and the District of Columbia eventually followed suit and enacted their own rape shield rules of evidence or statutes."[69]

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[61] Anderson, *supra* note 50, at 946.

[62] *Id.* at 981.

[63] *Id.*

[64] *Id.* at 981 (citing Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 106 (2002)).

[65] *See, e.g.*, DiFonzo, *supra* note 59 ("[T]here is no victory in this . . . . I don't think there's closure. I think it's reopened closed wounds.'").

[66] Some scholars have estimated that unreported rapes in the 1970s—prior to passage of *any* rape shield statutes—ranged anywhere from "two-to-one, to ten-to-one, and even as high as twenty-to-one." deMuele, *supra* note 57, at 149 (citing CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 20 (1992)).

[67] *Id.*

[68] *Id.*

[69] Anderson, *supra* note 64, at 81.

Today, almost every state, and the federal government, has some form of statute restricting the flow of information during a rape trial.[70] There are four basic categories of rape shield statutes.[71] The "Michigan model" (used by twenty-five states) "prohibits the use of sexual conduct evidence, but creates limited, specific exceptions."[72] This is the strictest model in terms of amount of evidence restricted.[73] In contrast, the "Texas model" (used by eleven states, including Colorado) "gives trial courts great latitude to admit sexual history evidence using a traditional balancing of 'probative value' against 'prejudicial effect' standard."[74] The practical effect of these "judicial discretion" laws, in the opinion of some, is to admit potentially *all* evidence, for the judge has the "discretion to admit this evidence if he is convinced it is relevant" and the Texas Model therefore "bars nothing."[75] Between these two opposites lie the "federal model" and the "California model."[76] The federal model (used by seven states) "essentially adopts the Michigan model, but adds a provision allowing defendants to introduce sexual history evidence falling outside one of the enumerated exceptions if doing so is 'constitutionally required.'"[77] Under the "California model" (used by seven states), "sexual history evidence is barred or admitted depending on whether it is offered to prove consent or whether it is offered for credibility

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[70] *Id.* Arizona is the only state that currently does not have a rape shield statute. Chen Shen, *Study: From Attribution and Thought-Process Theory to Rape-Shield Laws: The Meanings of Victim's Appearance in Rape Trials*, 5 J.L. & FAM. STUD. 435, 445 (2003). The federal government's rape shield statute has been in effect since 1978. FED. R. EVID. 412 (1978).

[71] Cristina C. Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 DRAKE L. REV. 45, 46 n.2 (2002) (citing Galvin, *supra* note 22, at 765 n.3).

[72] *Id.*; *see also* Galvin, *supra* note 22, at 813–14 ("Only one exception is common to all Michigan-type statutes; all permit the introduction of evidence of sexual conduct between the complainant and the accused. Other exceptions vary widely in number and nature. At one extreme are five states that have no additional exceptions; only evidence of sexual conduct between the complainant and the accused is admissible. At the other extreme are four states that have three further exceptions. In the middle are seventeen states that have either one or two additional exceptions. Clearly this spectrum of admissibility reflects a lack of consensus among state legislatures concerning the circumstances under which such evidence must be admitted to accommodate the needs of the accused.") (citations omitted).

[73] Tilley, *supra* note 71, at 46 n.2.

[74] *Id.*

[75] Anderson, *supra* note 16, at 17.

[76] *Id.* at 15–16.

[77] Galvin, *supra* note 22, at 775; *see also* FED. R. EVID. 412(b)(1) (admitting evidence of the victim's sexual behavior when offered to prove that someone else was the source of the semen, evidence of the victim's sexual behavior offered to prove consent, and evidence, the exclusion of which would violate the defendant's constitutional rights).

purposes."[78] Of the fifty state rape shield laws, New Jersey and Wyoming have the strongest.[79]

Ironically, in light of the morass of the *Bryant* trial, Colorado courts have consistently affirmed the importance of respecting victims' rights through the criminal process.[80] As a state which adopted the Texas model "judicial discretion" rape shields, however, the "importance of respecting victims' rights" rings hollow because this importance is weighed and measured not by any predefined legislative statute, but rather is determined through the sole discretion of the trial court judge.[81]

IV. COURTING DISASTER: PROBLEMS WITH THE RAPE SHIELD STATUTES

The rape shield statutes have always been controversial.[82] The primary criticism of the statutes is that they violate a defendant's constitutional rights,[83] but other significant criticisms include the circular logic and flawed premises under which the statutes were passed and are defended. Defendants'

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[78] Galvin, *supra* note 22, at 775.

[79] State v. Garron, 177 N.J. 147, 184 (2003).

[80] People v. Reynolds, 578 P.2d 647, 647 (Colo. 1978) ("Because the prospect of public disclosure of the details of a sexual assault incident might deter crime victims from reporting the crimes and testifying freely in court, it is critical that, where proffered evidence of this kind is irrelevant, it not be publicized."); People v. Murphy, 919 P.2d 191, 194 (Colo. 1996) (purpose of Colorado's rape shield statutes was to "provide rape and sexual assault victims greater protection from humiliating 'fishing expeditions' into their past sexual conduct"); People v. McKenna, 585 P.2d 275, 278 (Colo. 1978) ("Victims of sexual assaults should not be subjected to psychological or emotional abuse in courts as the price of their cooperation in prosecuting sex offenders."); People v. Gholston, 26 P.3d 1, 6 (Colo. Ct. App. 2000) (purpose is to prevent a trial "from shifting its focus away from the culpability of the accused towards the virtue and chastity of the victim . . . . [i]n other words, the purpose of the statute is to prevent trial of the victim instead of the accused").

[81] *See, e.g.*, Anderson, *supra* note 16, at 16 (emphasis added).

[82] Andrea A. Curcio, *The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws*, 20 GA. ST. U. L. REV. 565, 577 (2004) (highlighting the "tension between a desire to protect rape victims and a need to preserve the rights of criminal defendants" as illustrative of the "extremely controversial" nature of the rape shield statutes).

[83] Tilley, *supra* note 71, at 52; Lawrence Herman, *What's Wrong with the Rape Reform Laws?*, 3 C.L. REV. 60, 70–72 (Dec. 1976/Jan.1977); Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1262–66 (1989); Pamela J. Fisher, Comment, State v. Alvey*: Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law*, 76 IOWA L. REV. 835, 835–36 (1990); Merry C. Evans, Note, *The Missouri Supreme Court Confronts the Sixth Amendment in Its Interpretation of the Rape Victim Shield Statute*, 52 MO. L. REV. 925, 926–27 (1987).

rights proponents argue that rape trials erode substantive protections by removing constitutional rights enjoyed in all other criminal trials.[84] Hale reminds us that "it must be remembered that [rape] is an accusation easy to be made, hard to be proved, but harder to be defended by the accused, though innocent."[85] Rape trials quickly devolve into "he said/she said" affairs, where the innocent may in theory be easily and falsely accused, and the responsibility of any justice system is to ensure that criminal defendants have every opportunity to defend themselves. Quite clearly, rape shield statutes significantly restrict the opportunity to defend, as their *intent* is to control the flow of information a defendant can introduce to influence a jury.

A. *Circular Logic*

Overwhelmingly, the single biggest rationale for the rape shield statutes was a need to encourage women to come forward and accuse their rapists of the crime, due to the widespread belief that numerous rapes were unreported.[86] Estimates of these unreported-to-reported rapes prior to rape shield passage range from "two-to-one, to ten-to-one, and even as high as twenty-to-one."[87] Beyond the above reasons of fear and shame, problems in clearly *defining* rape also "led to substantial underreporting of such statistics by authorities;" the earliest definitions considered included only rape by strangers, and disqualified sexual assault by persons known to the victim.[88]

However, this rationale violently conflicts with another justification for the statutes: "dissatisfaction with then-existing rape laws and *concern regarding a sharp increase in the number of reported rapes*."[89] Such conflicting rationales may perhaps be harmonized: a sharp increase in reported rapes increased public exposure, which in turn rekindled long-extant fears about rape victims coming forward. It is noteworthy, on the other hand, that the most compelling argument for increased protection (that rape victims *will not* accuse their rapists absent rape shield statutes) was touted in an era in which rape victims *were* accusing rapists at a "sharp increase" from previous years.[90]

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[84] As discussed more fully in Part IV, *infra*, the two main criticisms of rape shield statutes are (1) the curtailing of evidence available for other crimes—even more "serious" crimes than rape, and (2) the deprivation of a defendant's Sixth Amendment right to confront his accuser.

[85] WILLIAM BLACKSTONE, 4 COMMENTARIES *215 (1767).

[86] deMuele, *supra* note 57, at 149.

[87] *Id.*

[88] *Id.* at 149 n.36 (citing SUSAN ESTRICH, REAL RAPE 29 (1987)).

[89] SPOHN & HORNEY, *supra* note 66, at 20.

[90] *Id.*

This increase in reported rapes *cannot* be attributed to the rape shield statutes: no state had passed such legislation prior to the increase.[91] Obviously, one could argue that the surrounding culture had changed significantly prior to the passage of the statutes, which reversed, in part, the chilling effect that had previously existed. Such arguments, however, cut both ways: if the culture had changed so significantly—and *something* was responsible for the "sharp increase in the number of reported rapes"—then this biggest policy reason for the statutes' existence dissolves. At best, the most common rationale for the statutes is based on circular logic—at worst, the arguments are deceptive and untenable.

B. *Flawed Premises*

Another prominent criticism of the rape shield statutes is that they rely on intentionally incorrect definitions of "relevance" and "irrelevance." These terms are misleading and—I argue—unnecessary, as the need for rape shield statutes is apparent without relying on subterfuge and wordplay. Additionally, the common rhetoric of rape being a "fate worse than death" is both incorrect legally and needless strategically.

1. *Disingenuous Terminology*

Colorado's rape shield statutes state that evidence of a victim's sexual history is inadmissible because it is "irrelevant" to the crime of rape.[92] This is not strictly accurate. Relevance is generally a very easy standard to meet, with very low thresholds. Under federal guidelines, echoed by most states (including Colorado), evidence is relevant if it has "*any* tendency to make the existence of *any* fact that is of consequence to the determination of the action *more probable or less probable than it would be without the evidence.*"[93] This low-threshold rule is subject to a balancing test to see if the "probative

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[91] *Id.*

[92] *See, e.g.*, People v. Murphy, 919 P.2d 191, 195 (Colo. 1996) ("[Rape shield] statute creates a presumption that evidence of prior sexual conduct is irrelevant."); People v. Reynolds, 578 P.2d 647, 649 (Colo. 1978) ("[I]t is critical that, where proffered evidence of this kind is irrelevant, it not be publicized."); People v. Moreno, 739 P.2d 866, 867 (Colo. Ct. App. 1987) (finding evidence of victim's reputation for sexual conduct irrelevant); People v. Harris, 43 P.3d 221, 225 (Colo. 2002) ("[U]nless an accused can make a preliminary showing that the evidence [of the victim's prior sexual activities] is relevant to some issue in the case, an inquiry into a victim's prior or subsequent sexual conduct is barred [under the rape shield statute]."); People v. McKenna, 585 P.2d 275, 279 (Colo. 1978) ("[T]here is no constitutional right to introduce irrelevant and highly inflammatory evidence.").

[93] FED. R. EVID. 401 (emphasis added); COLO. REV. STAT. § 401 (1989).

value" of the relevant evidence "is substantially outweighed by the danger of unfair prejudice . . . ," but the bare fact remains that "relevance" is a very easy standard to meet.[94] Therefore, while a victim's sexual history may not be relevant—and the majority of such evidence will never be relevant—this sexual history information may indeed be very relevant to a question in the case.

A more honest explanation is that "legitimate state interests" behind rape shield statutes "such as giving rape victims heightened protection against 'surprise, harassment, and unnecessary invasions of privacy' may allow the exclusion of *relevant evidence*."[95] A revised balancing test is used to evaluate whether the "state's interests in excluding evidence outweigh the defendant's interests in having evidence admitted;" these considerations are "*in addition to the more traditional concerns* of prejudice, issue and jury confusion, which *usually guide a trial court's evidentiary rulings*."[96] Therefore, the excluded evidence is barred not because it is irrelevant, but because the evidence is considered too inflammatory for the purposes of a fair rape trial, and "fairness" is guided by a concern for the victim.[97]

2. *A Fate Worse than Death?*

In explaining the evidentiary requirements for rape trials, one court found that "to a 'good' woman rape is 'a fate worse than death' and she should fight to the death to resist it."[98] This notion of rape as a fate worse than death has long been accepted both judicially and socially, reinforcing the overemphasis on chastity as discussed in Part II.[99] Such notions are inherently dangerous; however, the *Wiley* Court found that women should

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[94] FED. R. EVID. 403; COLO. REV. STAT. § 403 (1989).

[95] Richmond v. Embry, 122 F.3d 866, 872 (10th Cir. 1997) (emphasis added) (quoting Michigan v. Lucas, 500 U.S. 145, 153 (1991)); *see also* Jeffries v. Nix, 912 F.2d 982, 986 (8th Cir. 1990) ("The rape shield law is an exception to the general rule that evidence with some relevance is generally admissible. The purpose behind the rule is to protect the victim's privacy [and] to encourage reporting of sexual assaults . . . .") (citation omitted).

[96] *Embry*, 122 F.3d at 872 (emphasis added).

[97] *Id.*

[98] United States v. Wiley, 492 F.2d 547, 555 (D.C. Cir. 1973).

[99] *See supra* Part II. This term is used rather flippantly by courts. *See, e.g.*, Hoy v. Mendoza-Rivera, 267 F.2d 451, 452 (9th Cir. 1959) ("[w]earing a double breasted [suit] is to him a fate worse than death."); Jones v. Am. Broad. Cos., Inc., 694 F. Supp. 1542, 1548 (M.D. Fla. 1988) (sending six baby elephants to a circus in Mexico is sending them to a fate worse than death); Udey v. Kastner, 644 F. Supp. 1441, 1445 (E.D. Tex. 1986) (noting testimony that dietary noncompliance results in being cut off from the "Kingdom of Heaven," which is a fate worse than death).

prefer death over rape. In the court's view, if the victim succumbed and "no such fight is put up, the woman *must have consented or at least enticed the rapist, who is therefore blameless*."[100]

Even if rape were considered a "fate worse than death" sociologically, the common law never held rape to be a crime worse than murder.[101] Modern Supreme Court precedent has established that "death is indeed a disproportionate penalty for the crime of raping an adult woman," though it obviously still remains in effect for other crimes.[102] In critical circles, an intense debate rages regarding the weight of rape as compared to other crimes—many argue that rape is the most violent and most degrading of the crimes, meriting special punishment and more rigid scrutiny of proposed evidence.[103]

Persuasive appeal notwithstanding, it seems counterintuitive that a crime that does not end a life may be punished more severely than a crime resulting in the death of the victim.[104] Under the most stringent of the rape shield statutes, a defendant charged with murder has more protections and greater leeway with introducing evidence in his defense than a defendant charged

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[100] *Wiley*, 492 F.2d at 555 (emphasis added).

[101] *See, e.g.*, People v. Whitson, 154 P.2d 867, 872 (Cal. 1944) (noting that "robbery, rape, or other crimes [are] less serious than murder").

[102] Coker v. Georgia, 433 U.S. 584, 597 (1977). The Court held that "[r]ape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder . . . ." *Id.* at 598.

[103] *See, e.g.*, Corey Rayburn, *Better Dead than R(ap)ed? The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1138 (2004) ("Americans have come to believe that rape is the most heinous crime 'worthy of the most serious punishment.'") (quoting Gary D. LaFree, RAPE AND CRIMINAL JUSTICE 62 (1989)); Arthur Astin, *The Top Ten Politically Correct Law Review Articles*, 27 FLA. ST. U. L. REV. 233, 246 (1999) ("[F]eminists consider the most heinous crime" to be rape.). Such views are not unique to America. *See, e.g.*, Damir Arnaut, *When in Rome . . .? The International Criminal Court and Avenues for U.S. Participation*, 43 VA. J. INTL.L. 525, 543 (2003) ("The head of the Yugoslav delegation, moreover, was particularly incensed, having viewed rape as 'among the most heinous' crimes.") (quoting Milovan Djilas, CONVERSATIONS WITH STALIN 89 (Michael B. Petrovich, trans. 1962)).

[104] There is one crucial caveat to this statement: although murder may well be a more "serious" crime than rape due to its finality, in terms of the justice system, rape may merit special considerations, even over murder. This is because, with a homicide, the state's interest in prosecuting the crime is paramount—it is irrelevant whether the family of the victim "wants" to prosecute the murder. Rape, in contrast, typically has a victim and a rapist, and if the victim decides not to tell anyone about the crime, there is no "paramount state interest" in prosecuting the rape. From this perspective, the state's interest in prosecuting rape crimes may well be higher than its corresponding interest in prosecuting murders, if only to encourage victims to come forward. *See* deMuele, *supra* note 57, at 160.

with rape.[105] More compellingly, a defendant who rapes and murders a victim enjoys a lesser standard of evidentiary exclusion for the murder than he does for the rape.[106] This should give pause to even the most vocal of rape victims' rights proponents: a legal structure which *rewards* a crime ending in death with more substantive and procedural protections must, by necessity, be flawed. As Susan Jacoby noted, "the most important change brought about by the women's movement is abandonment of the antediluvian notion that rape is 'a fate worse than death.' Nothing is worse than death . . . ."[107]

C. *The Sixth Amendment*

The Sixth Amendment's "Confrontation Clause" grants the accused the right "to be confronted with the witnesses against him."[108] On its face, this seems squarely contradictory to the rape shield statutes.[109] Indeed, the Supreme Court has explained that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by *subjecting it to rigorous testing* in the context of an adversary proceeding . . . ."[110] Although the Court recognized that the "face-to-face

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[105] A defendant charged with murder is subject to normal evidentiary rules, including the traditional "balancing test" of probative value of evidence with its potential for unfair prejudice. FED. R. EVID. 403. In contrast, a defendant charged with both rape and murder is restricted from presenting evidence that would be violative of the rape shield statutes, even if such evidence is relevant to the murder defense. A common, and unsatisfactory, solution is allowing the evidence for one purpose (the murder) and then instructing the jury to "forget" the evidence for the other purpose (the rape); such limiting instructions, while admittedly common, are especially indefensible in this context. More pertinently, limiting instructions here highlight my point regarding the illogical evidentiary standards as applied to rape in comparison to all other crimes.

[106] *See supra* note 105.

[107] Susan Jacoby, Editorial, *Thank Feminists for Rape Reforms*, BALTIMORE SUN, Aug. 13, 2002, at 11A, *available at* http://www.canow.org/news/rape_article.html.

[108] U.S. CONST. amend. VI.

[109] *See* Curcio, *supra* note 82, at 577 n.76 ("Defendants have litigated the constitutionality of rape shield laws in virtually every state."). For a list of state court decisions addressing this issue, see Daniel Lowery, Note, *The Sixth Amendment, the Preclusionary Sanction, and Rape Shield Laws:* Michigan v. Lucas, *111 S. Ct. 1743 (1991)*, 61 U. CIN. L. REV. 297, 315 n.97 (1992) ("The U.S. Supreme Court has held that in a given fact situation, a rape shield statute as applied to prohibit cross examination about a victim's sexual history may violate a defendant's Sixth Amendment confrontation clause rights.").

[110] Maryland v. Craig, 497 U.S. 836, 845–46 (1990) (emphasis added) (holding that the Sixth Amendment requires that the witness (1) "will give his statements under oath," (2) will "submit to cross-examination, the 'greatest legal engine ever invented for the discovery of the truth,'" and (3) "permits the jury that is to decide the defendant's fate to

presence may, unfortunately, upset the truthful rape victim," the Constitution demands such potentially upsetting moments because "by the same token it may confound and undo the false accuser."[111]

Such rights are not limitless, however, and the Court elucidated distinct situations in which the Sixth Amendment does not demand confrontation.[112] The Court created a two-part test for whether the Sixth Amendment is satisfied even absent face-to-face confrontation: (1) whether the "denial of such confrontation is necessary to further an important public policy," and (2) "where the reliability of the testimony is otherwise assured."[113] In *Craig*, the Court found that both prongs were satisfied in child abuse cases, and that the Sixth Amendment "does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case."[114] Accordingly, the rape shield statutes have apparently passed the constitutional test,[115] although the Supreme Court's recent holding in *Crawford v. Washington*[116] calls the matter into some question.[117]

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observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility") (quoting California v. Greene, 399 U.S. 149, 158 (1970)).

[111] Coy v. Iowa, 487 U.S. 1012, 1020 (1988) (holding that the Sixth Amendment was violated by placing an opaque screen between defendant and child abuse victim during testimony against defendant).

[112] *Craig*, 497 U.S. at 847–48 (1990) ("[W]e have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial."); Mattox v. United States, 156 U.S. 237, 243–44 (1895) (noting that dying declarations do not violate the Sixth Amendment).

[113] *Craig*, 497 U.S. at 850.

[114] *Id.* at 860.

[115] *See* Wade v. Herbert, 391 F.3d 135, 142 (2d Cir. 2004) (finding that the Supreme Court "reasserted that there is no per se constitutional bar against" Michigan's rape shield law); Hammer v. Karlen, 342 F.3d 807, 812 n.6 (7th Cir. 2003) ("[T]he Supreme Court has yet to hold that any application of a rape-shield statute is inconsistent with the Constitution.") (citing Pack v. Page, 147 F.3d 586, 589 (7th Cir. 1998)); State v. Blue, 592 P.2d 897, 901 (Kan. 1979) (upholding Kansas's rape shield law as constitutional under Supreme Court precedent); Logan v. Marshall, 680 F.2d 1121, 1123 (6th Cir. 1982) (finding that rape shield laws do not violate a criminal defendant's right of confrontation); Bell v. Harrison, 670 F.2d 656, 659 (6th Cir.1982) (upholding rape shield statutes as constitutional).

[116] The Supreme Court revisited Confrontation Clause jurisprudence in *Crawford v. Washington*, 541 U.S. 36, 59 (2004). There, the Court held that "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* The Court defined "testimonial" as "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.* at 51. In other words, under

Criticism of the rape shield statutes on Confrontation Clause grounds has been steady since the passage of the first rape shield statutes.[118] Courts in Colorado have wrestled with the issue, concluding that rape shield statutes do *not* violate the Sixth Amendment.[119] The key strategy throughout this line of cases is to categorize the evidence as "irrelevant" in order to evade the commands of the Sixth Amendment.[120] As discussed above, this quibbling with semantics is unsatisfactory.

However, perhaps reflecting a shift in Colorado's philosophy, the court in the *Bryant* civil suit cited the Sixth Amendment right to confrontation as a compelling issue in the case, holding that the suit must be open to the public and that the accuser's name must be published.[121] The impact of *Crawford* is

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Crawford's test, if a declarant (here, the rape victim) makes a testimonial statement (one which she reasonably expects could be used against her attacker), then such statement is admissible only if (1) the victim is unavailable, and (2) the defendant has had a prior opportunity to cross-examine. On its face, this strikes down the rape shield statutes as unconstitutional, as the defendant has *not* had a prior opportunity to cross-examine the victim. Indeed, this is precisely what the statutes *prevent* the defendant from doing.

[117] The Supreme Court obviously was not dealing with rape shield statutes in *Crawford*, and thus has not yet ruled on the constitutionality of such statutes under the *Crawford* test. Further, *Crawford* would not automatically destroy the rape shield statutes, as the holding could possibly be harmonized with the point that I have raised already: under "normal" rules of evidence (incorporating the *Crawford* test), the defendant is permitted to cross-examine his accuser in ways forbidden in rape trials. The issue remains whether rape is a "special" crime, and whether the public policy of encouraging the reporting of rapes outweighs the defendants' right to cross-examination, particularly given this new constitutional ruling.

[118] *See* J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 589 (1980) ("The state and federal governments may not legislate to alter the rules of evidence so as to place *unusual and new burdens* on the accused's ability to defend himself. Testing rape victim shield laws against this federal constitutional standard finds many of them defective.") (emphasis added).

[119] People v. Johnson, 671 P.2d 1017, 1020 (Colo. Ct. App. 1983) ("[Rape shield] statute does not deny defendant's right to confront his accuser."); People v. McKenna, 585 P.2d 275, 279 (Colo. 1978) (finding "no denial of the defendant's right to confront his accuser"); People v. Harris, 43 P.3d 221, 227 (Colo. 2002) (noting that the Sixth Amendment right to confrontation only allows the defendant to introduce relevant and admissible evidence).

[120] *See* text accompanying *supra* note 92.

[121] Erin Gartner, *Judge Says Bryant's Accuser Must Be Identified in Court*, DENVER POST, October 6, 2004, at A01, *available at* http://www.denverpost.com/Stories/0,1413,36%257E28682%257E2450392,00.html ("It is apparent that the adjudication of the plaintiff's claims by trial will require the jury to determine the credibility of the parties, and that the defendant must have a fair opportunity to confront his accuser . . . . Public confidence in the results of court proceedings require that they be open to observation."). Obviously, this was in the civil

yet to be determined, but it may prove to be the most influential constitutional pronouncement on the rape shield statutes, and the case ironically had nothing to do with rape.[122]

D. *Critiquing Colorado—Or, How Bad Was Bryant?*

Rape shield statutes in Colorado, as in ten other states, are considered "[j]udicial discretion laws."[123] That is, they "grant judges the discretion to admit or bar evidence of a woman's sexual history, and so do not shield victims in any new way. . . . [T]hese shields are relatively weak."[124] While the "sexual conduct of the victim or witness" must be, in the judge's view, "relevant to a material issue to the case," this is the only hurdle such evidence faces.[125] In *Bryant*, the judge determined that "[t]o the extent that the court [deems evidence of the alleged victim's prior or subsequent] sexual conduct [adduced during pretrial procedure pursuant to the rape shield law] relevant to the case, this evidence will be admissible at the public trial."[126] While sexual history evidence is ostensibly forbidden, these statutes have "loophole[s which] allow[] courts to admit evidence."[127] The practical effect of these judicial discretion laws, according to this view, is potentially to admit *all* damaging and embarrassing sexual history information; the judge has the "discretion to admit this evidence if he is convinced it is relevant *because Colorado's rape shield law bars nothing*."[128]

Such criticisms somewhat overstate the admissibility of sexual history evidence in rape trials in Colorado. First, *most* sexual history evidence is restricted.[129] What is problematic in Colorado is the *amount* of discretion the

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proceeding rather than the criminal trial, but the defendants' right to Sixth Amendment protection is *stronger* in the criminal context.

[122] *See supra* notes 116–17 and accompanying text.

[123] Anderson, *supra* note 16, at 16.

[124] *Id.*

[125] *Id.*

[126] People v. Bryant, 94 P.3d 624, 631 (Colo. 2004).

[127] Martha Neil, *The National Pulse: Bryant Case Leads to Calls for Change in Rape-Shield Laws: Loopholes Allow Testimony of Other Sexual Activity, Victims Advocates Say*, 3 ABA J. E-REPORT 31, Aug. 6, 2004; Anderson, *supra* note 16, at 16 (terming the "[j]udicial discretion laws" as "[h]oles in the armor" of the rape shield statutes).

[128] Anderson, *supra* note 16, at 17 (emphasis added).

[129] *See, e.g.*, People v. Murphy, 919 P.2d 191, 195 (Colo. 1996) ("[Rape shield] statute creates presumption that evidence of prior sexual conduct is irrelevant."); People *ex rel.* K.N., 977 P.2d 868, 876–77 (Colo. 1999) (holding that, without more, evidence of complainant's sexual history is an impermissible collateral attack on her credibility as a witness and is not admissible for that purpose under rape shield law); People v. Carlson,

trial court has in determining the admissibility of sexual history evidence and the resultant *potential* for abuse.[130] This is, however, the same standard that applies to all other crimes—the trial judge always has considerable discretion. It is crucially important to realize that these "holes" in the rape shield statutes are the normal guidelines for the admissibility of evidence as applied to *all* other crimes.[131]

The question remains: are there compelling reasons why rape should be treated differently from all other crimes? As discussed above, there are forceful arguments that the unique nature of rape demands increased protections for the victim, or we run the risk of increasingly under-reported rapes, which in turn results in societal harm.[132] With regard to constitutional

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72 P.3d 411, 419 (Colo. Ct. App. 2003) ("[T]he rape shield statute excludes evidence of witness's prior or subsequent sexual conduct, except in narrowly defined circumstances."); People v. Wallen, 996 P.2d 182, 186 (Colo. Ct. App. 1999) ("A defendant cannot introduce evidence of a victim's prior sexual history to attack the credibility of a victim as a witness."); People v. Hurd, 682 P.2d 515, 517 (Colo. Ct. App. 1984) (noting that evidence which dealt generally with victim's alleged promiscuity was properly excluded in absence of defendant's preliminary showing of relevance sufficient to overcome statutory presumption of irrelevance); People v. Harris, 43 P.3d 221, 225 (Colo. 2002) ("[U]nless an accused can make a preliminary showing that the evidence [of the victim's prior sexual activities] is relevant to some issue in the case, an inquiry into a victim's prior or subsequent sexual conduct is barred [under the rape shield statute]."); Richmond v. Embry, 122 F.3d 866, 876 (10th Cir. 1997) (excluding evidence that twelve-year-old victim owned condoms and had frequent male visitor under rape shield statute); *Wallen*, 996 P.2d at 185–86 (finding rape shield statute precluded admission of evidence that sexual assault victim had allegedly falsely reported several past sexual assaults, where evidence's impeachment value did not outweigh harm to victim).

[130] People v. Miller, 981 P.2d 654, 657 (Colo. Ct. App. 1998) ("A trial court is afforded considerable discretion in deciding questions concerning the admissibility of evidence, and absent an abuse of discretion, its evidentiary rulings will be affirmed.").

[131] *See* Tanford & Bocchino, *supra* note 118 ("[Regarding the issue of] whether evidence of a rape victim's sexual history can ever be relevant . . . . Intuitively, the answer seems to be that sometimes it is, but often it is not. The same may be said for any types of evidence, however; *the relevance of sexual history evidence should therefore be determined, as with other evidence, by the judge as he sees the issues* develop at trial. Even if such evidence is generally irrelevant, a statute that precludes a particular inquiry that is relevant in one case has infringed the rights of the accused to present evidence.") (emphasis added). Obviously, this argues beyond my proposition—as it is calling for the removal of all victim protections and treating rape identically to all other crimes—but the point remains that the "holes" in the rape shields represent merely the normal operation of the evidentiary rules.

[132] *See* STAFF OF S. COMM. ON THE JUDICIARY, 103D CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE: A MAJORITY STAFF REPORT FOR SENATE COMMITTEE ON THE JUDICIARY, 14 (Comm. Print 1993) (finding that more than 2000 women are raped every week, but including unreported rapes may bring the total "as high as 12,000 every week").

issues, the Supreme Court's recent decision in *Crawford* will undoubtedly result in renewed challenges under the Sixth Amendment.[133] Until that time, and assuming arguendo that the heinous nature of rape merits "special" evidentiary rules, the remainder of this Note focuses on *which* increased protections should be present in the rape shield statutes.

V. CIRCUMVENTING DISASTER: A PROPOSED SOLUTION

Both sides in the rape shield statute debate have proposed solutions, ranging from making the statutes more restrictive[134] to completely eliminating them and relying solely on normal evidentiary rules.[135] After decades of analysis, there seems little to add to this academic debate beyond the already-provided summary of opposing viewpoints. However, this Note argues that the solution lies in keeping the statutes—as a concession that the public policy of encouraging rape victims to come forward is necessary and appropriate—but tightening the "constitutional catch-all" provision of Federal Rule of Evidence 412 into three specifically delineated exceptions.[136] While some *relevant* evidence—defined under the "normal" low threshold of evidence—will remain excluded, this is only permissible to the extent that the defendant's constitutional rights are not violated. Most importantly, under my proposed solution, the term "constitutional rights" is restricted to three unambiguous situations. While criticisms will still exist—on both sides of the debate—they at least will be reduced to a more palatable level.

A. *Honesty is the Most Strategic Policy*

Aside from Sixth Amendment concerns, the biggest criticism of the rape shield statutes is the flawed premises under which they were passed and the flawed logic by which they are currently defended.[137] The first order of business, therefore, is to defend the revised rape shield statutes as necessary for the public policy purpose of encouraging rape victims to come forward.[138] Gone from the discussion should be quibbling over the semantics of "relevance" and "irrelevance" in rape trials; instead the focus should shift

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[133] Crawford v. Washington, 541 U.S. 36, 59 (2004).

[134] Anderson, *supra* note 16, at 19.

[135] Tilley, *supra* note 71, at 78.

[136] Federal Rule of Evidence 412(b)(1)(C) currently allows any "evidence the exclusion of which would violate the constitutional rights of the defendant." FED. R. EVID. 412(b)(1)(C). Of the three prongs, this is the most problematic due to its facially ambiguous and interpretatively limitless nature. *See, e.g.*, Anderson, *supra* note 16, at 16.

[137] *See supra* Part IV.

[138] *See supra* Part II.

to whether the evidence is admissible under one of the three prongs. This also addresses the criticism of circular logic[139] regarding the statutes' origin: regardless of the *reason* behind a sharp increase in a number of reported rapes in the early 1970s, if this policy rationale remains vibrant today—and I argue that it does—then it follows that the rape shield statutes remain necessary. While it may seem unsatisfactory to allow statutes passed under false premises, they are still defensible based on their result and public policy purpose, even if their initial rationales are suspect.

B. *Amend Rule 412 for Use as a Model Code*

As a major criticism of the current rape shield statutes is their lack of uniformity, a ready solution is to establish consistent guidelines for admissible evidence in rape trials. This Note proposes amending current Federal Rule of Evidence 412 and allowing states to adopt it into their legislation. As Rule 412 currently stands, there is virtually no criticism of the first prong, which allows evidence as an alternate explanation of "physical evidence."[140] While there is some criticism of the second prong, which allows "prior sexual history *between the parties*," this criticism is misplaced, as such evidence is intuitively relevant (though not sufficient) in a rape case.[141]

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[139] *See supra* Part IV.

[140] FED. R. EVID. 412 (b)(1)(A); Anderson, *supra* note 64, at 84 ("I will set aside the first exception—the admission of evidence to prove that a person other than the accused is the source of semen or injury—because I support it. This narrow exception is appropriate, especially when misidentification of the perpetrator is a common evidentiary issue in stranger rape cases.") (footnote omitted).

[141] FED. R. EVID. 412 (b)(1)(B). *Contra* Anderson, *supra* note 16, at 17 ("She consented to *a lot* of sex before; this was sex, therefore, she consented again this time. In other words, it is her modus operandi to be sexually loose. This is exactly the kind of character assassination that rape shield laws should prevent."). Notwithstanding Anderson's argument, and conceding that the second prong is more problematic, this is precisely what the justice system should allow the defendant to introduce. This evidence is not *sufficient* to destroy the state's case against a defendant, but allowing such evidence recognizes that the burden of proof is on the state, not the defendant, and evidence that goes to show previous consensual encounters is clearly relevant in a rape case (which typically comes down to the defendant arguing that it was consensual, and the victim arguing that it was not). This evidence, while not sufficient, should properly go before the jury. Because the jury must evaluate the veracity of each party, it is crucial for each party to be able to establish the nature and extent of their sexual relationship—by definition, this should include their *prior* sexual relationship. Further, this does *not* signal a retreat to the dark days of the "marital exemption" era, as there is no claim that consensual sex in the past demands the conclusion of sexual consent in the present; this merely recognizes that the evidence of prior sexual history between the parties is significant as yet another factor in determining credibility.

The third prong, as currently written, is easily the most problematic of the various rape shield statutes, as it admits any evidence, subject to normal evidentiary rules, "the exclusion of which would *violate the constitutional rights of the defendant.*"[142] This last prong has been roundly (and justifiably) criticized.[143] But the most valid criticism is not of the *application* of this loosely worded "constitutional rights" provision, but rather the *potential* abuse of an exception so broadly phrased.[144] I therefore propose rewording the third prong and clearly delineating the situations available for its application.

C. *Valid "Constitutional Rights" Exceptions*

The first and most obviously correct situation in which a defendant's constitutional right to present a defense outweighs an accuser's privacy interest is a case in which bias, motive to lie, or evidence of fabrication is demonstrable.[145] This is a constitutional right explicitly recognized by the Supreme Court.[146] If the Sixth Amendment has any meaning, it surely allows a defendant to present evidence that his accuser has a motive to lie and fabricate charges, as virtually every claim made by the accuser logically becomes suspect.[147] I would therefore include motive to lie, bias, or evidence of fabrication in the third prong.[148]

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[142] FED. R. EVID. 412 (b)(1)(C) (emphasis added).

[143] *See* Anderson, *supra* note 64, at 56 ("[C]ourts routinely misinterpret and exaggerate the scope of the defendant's constitutional right to inquire into the complainant's sexual history, particularly when the complainant is deemed promiscuous with the defendant or others.").

[144] As discussed below, and notwithstanding Anderson's comments, courts have *not* "routinely misinterpret[ed] and exaggerate[ed] the scope of the defendant's constitutional right." Anderson, *supra* note 143, at 56. However, as the system stands now, any court certainly *could.*

[145] Although these terms are slightly different, their meanings (and results) are interchangeable: "bias" and "motive to lie" are roughly synonymous, and "fabrication" is typically a product of bias/motive to lie. I am including all three terms in my proposed statute to cover cases in which there is bias/motive to lie but no evidence of fabrication, or the (probably rare) case in which there is evidence of fabrication but no apparent bias/motive to lie.

[146] Olden v. Kentucky, 488 U.S. 227, 230 (1988) (holding that the trial court's refusal to allow the defendant to impeach the alleged victim's testimony "by introducing evidence supporting a motive to lie deprived him of his Sixth Amendment right to confront witnesses against him").

[147] This is not to say that the mere allegation of a motive to lie allows a defendant to admit sexual history evidence. There must, of course, be a sufficient connection between the alleged motive and the evidence sought to be introduced. *See, e.g.*, State v. Samuels, 88 S.W.3d 71, 84 (Mo. Ct. App. 2002) ("There is no connection between any prior

Second, courts have routinely allowed evidence under the constitutional rights prong if the evidence is offered to impeach the testimony of the accuser regarding her sexual history.[149] The right to impeach a witness is cherished and well-supported through case law.[150] I would therefore include

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allegations of abuse the girls may have made and a motive to lie in the present case. . . . The evidence does not support [the defendant's] argument."); State v. Johnson, 958 P.2d 1182, 1186 (Mont. 1998) ("The [C]onstitution does not require a blanket exception to rape shield statutes for all evidence related to motive to fabricate. Speculative or unsupported allegations are insufficient to tip the scales in favor of a defendant's right to present a defense and against the victim's rights under the rape shield statute.").

[148] Indeed, there was some evidence of fabrication in *Bryant*, as his accuser "admitted [to] lying about certain aspects of their sexual-assault case in an initial interview with investigators," including "misstatements" about her reason for being late to work the day after the rape, and that "Bryant forced her to wash her face after their encounter in his room." Steve Lipsher & Alicia Caldwell, *Kobe's Accuser Admits Lies: Woman 'Very Sorry' for Misleading Investigators in Initial Talk*, DENVER POST, Oct. 9, 2004, at C03, *available at* http://v6.denverpost.com/Stories/0,1413,36%257E28682%257E2456063,00.html. The accuser further admitted that she made several false statements because she "felt [the detectives] did not believe what had happened to [her]." *Id.* Additionally, the "investigator notes, interviews and reports collected by prosecutors" included statements that the accuser "did not behave like a victim of a rape" and that she had "joked about how much money she would make from the case against [Bryant]." *Id.*

As to this last point, there is ample support for the argument that rape victims frequently do not "behave" as one would "expect" them to after a rape. *See* Valerie M. Ryan, Comment, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407, 411 (2004); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 664 (1998); Kenneth W. Gaines, *Rape Trauma Syndrome: Toward Proper Use in the Criminal Trial Context*, 20 AM. J. TRIAL ADVOC. 227, 252 (Winter 1996-1997). Such issues are outside the scope of this Note, and I merely argue that the justice system should recognize the *possibility* of fabricated charges, affording defendants the opportunity to respond to protect themselves.

[149] State v. Almurshidy, 732 A.2d 280, 287 (Me. 1999); State v. Calbero, 785 P.2d 157, 161–62 (Haw. 1989) (holding that the defendant's constitutional right to confrontation dictates that he be allowed to cross-examine complainant regarding her statements *to him* about her past sexual conduct); Blackmon v. Buckner, 932 F. Supp. 1126, 1128–29 (S.D. Ind. 1996) (holding that the evidence that a prisoner "sexually teased" other inmates was admissible when this was the precise issue that he had put in dispute).

[150] *See, e.g.*, Virts v. State, 739 S.W.2d 25, 29 (Tex. Crim. App. 1987) (accused's right of cross-examination of "State's witness includes the right to impeach the witness with relevant evidence that might reflect bias, interest, prejudice, inconsistent statements, traits of character affecting credibility, or evidence that might go to any impairment or disability affecting the witness' credibility"); State v. Santiago, 618 A.2d 32, 36 (Conn. 1992) ("[T]he trial court must allow a defendant to expose to the jury 'facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences

this in the list of admissible evidence under the third prong. A close subset of this point is allowing evidence of sexual history *after* the "state 'open[s] the door' to evidence contradicting the [victim's] statements as to her chastity to attack her credibility."[151] This is, again, impeachment, although it may deal with the prosecution's arguments through other witnesses about the victim's sexual behavior, rather than impeaching the victim's direct statements. Although this is a step further down the impeachment chain, the policies for admitting the evidence remain unchanged, and I would therefore add it to the list of statutory exceptions under the constitutional prong.

Other exceptions become more troublesome. Courts have found a constitutional right to present evidence "to rebut the inference a jury might otherwise draw that the victim was so naïve sexually that she could not have fabricated the charge;" this is allowed even where no explicit statement is made.[152] Here, there is unquestionable potential for abuse, as such presumptions are inferred rather than spoken. Courts have frequently realized this obvious danger and forbidden the evidence,[153] but have also demonstrated that they are just as likely to be swayed.[154] The distinction between these presumptions and the evidence that I would allow as admissible is obvious: sexual history evidence is admissible only when the prosecution has "opened the door" through testimony by *explicitly* averring the chastity or sexual reputation of the victim. Under this changed system, the defense counsel cannot introduce information about a victim's sexual history unless the prosecution has made an explicit statement about it. Such statements are not ordinarily made, of course, in "normal" rape trials—this primarily would be a factor in child sexual crimes cases, where the alleged victim is underage and the prosecution explicitly refers to the victim's

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relating to the reliability of the witness.") (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)); State v. Lubesky, 488 A.2d 1239, 1243 (Conn. 1985) ("Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted."); Mendez v. State, 412 So. 2d 965, 966 (Fla. Dist. Ct. App. 1982) ("Whenever a witness takes the stand, he ipso facto places his credibility in issue.").

[151] State v. Leonard, 513 A.2d 1352, 1354 (Me. 1986); Gov't of Virgin Is. v. Jacobs, 634 F. Supp. 933, 940 (D. V.I. 1986) (stating that the defendant has a constitutional right to impeach victim when the government first opens the door on this line of cross-examination).

[152] State v. Jacques, 558 A.2d 706, 708 (Me. 1989).

[153] *See, e.g.*, Jeffries v. Nix, 912 F.2d 982, 986 (8th Cir. 1990) (finding that testimony elicited from a rape victim about her family life and work at child care facility did not create an inference of chastity or open door for rebuttal evidence).

[154] *See, e.g.*, *Jacques*, 558 A.2d at 708 (finding that child rape cases "automatically" present an inference of "lack of sexual experience . . . without specific action by the prosecutor," and that defendants therefore are constitutionally empowered to rebut this presumption).

virginity. As the law stands now, some states would allow this sexual history evidence automatically, under the theory that the jury will *presume* virginity based solely on the age of the accuser—my solution allows the evidence only upon an explicit claim.

The *type* of sex involved has also led to courts to find that defendants may introduce sexual history information under the constitutional rights provision. For example, "courts are facing rape cases in which the defendant claims that what occurred was not rape but consensual sadomasochistic sex."[155] The defendants in these cases frequently attempt to bolster their "claim of consent by alleging that the woman had previously engaged in consensual sadomasochism with others."[156] This merely retells the same old rape story in updated terms: "[s]he consented to *a lot* of [sadomasochistic] sex before; this was [sadomasochistic] sex, therefore, she consented again this time."[157] As Anderson points out, it is illogical to conclude that, because "she was someone else's 'slave'," she consented to sex with the defendant.[158]

Similarly, when "women engage in significant sexual behavior in public places . . . some courts have been loathe to exclude evidence of their open activities," presumably under the rationale that such public sexual activity "suggests consent to sexual intercourse with the defendant."[159] This third-party sexual conduct would ordinarily be inadmissible under the rape shield statutes; the fact that it occurred publicly, however, is often enough for the court to make an exception. My proposed rule avoids these deviations from the rape shield scheme in that the *type* of sexual activity at issue has no bearing on the three valid constitutional exceptions.

D. *A Proposed Statute*

After incorporating the above revisions, the revised Federal Rule of Evidence 412(b)(1)(C) appears as follows:

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[155] Anderson, *supra* note 64, at 131 (citing People v. Murphy, 899 P.2d 294, 295 (Colo. Ct. App. 1994); State v. Collier, 913 P.2d 597, 602 (Kan. 1996); People v. Jovanovic, 700 N.Y.S.2d 156, 159 (N.Y. App. Div. 1999); State v. Guinn, 105 Wash. App. 1030, 1033 (Wash Ct. App. 2001).

[156] *Id.*

[157] Anderson, *supra* note 16, at 17 ("In other words, it is her modus operandi to be sexually loose. This is exactly the kind of character assassination that rape shield laws should prevent.").

[158] Anderson, *supra* note 64, at 134.

[159] *Id.* at 137 (citing State v. Colbath, 540 A.2d 1212, 1214 (N.H. 1988)). *But see* People v. Wilhelm, 476 N.W.2d 753, 759 (Mich. Ct. App. 1991) (finding that public sexual behavior with third parties was irrelevant to consent with the defendant).

Current Federal Rule of Evidence 412(b)(1)(C):
Evidence the exclusion of which would violate the constitutional rights of the defendant.

Proposed Federal Rule of Evidence 412(b)(1)(C):
Evidence *(i) of bias, motive to lie, or fabrication, (ii) offered for impeachment, or (iii) offered after the prosecution has "opened the door" by presenting testimony of the accuser's sexual history*, the exclusion of which would violate the constitutional rights of the defendant.

The italicized sections represent the changes to the current statute; my proposed statute allows only the exceptions discussed above, while continuing to list them under the rubric of "constitutional rights of the defendant." Unlike the current Rule 412(b)(1)(C), which has an open-ended constitutional rights provision—and allows individual trial court judges to determine whether constitutional arguments are acceptable or not—this amended rule clearly lists the three valid exceptions. I have left the "constitutional rights" language intact, as this provides the justification for the three exceptions, and reinforces the importance of the Sixth Amendment in rape trials.

This is not as radical a solution as that proposed by some, calling for wholesale repeal of *all* rape shield statutes.[160] Without any additional bar to evidence, the defense could "introduce evidence on a victim's sexual history, subject, of course, to the general evidentiary rules regarding relevance."[161] What commends this view is the idea that "[i]nstead of suppressing a jury debate on the role of sexual history in rape, legislatures [will] compel jurors to discuss the issue" and "complete a special verdict form."[162] Such a requirement "would force into the open a debate on the link between sexual history and consent," by explicitly asking "whether the jury believed the evidence regarding the victim's sexual history with the accused and with other men."[163] Because the premises behind the rape shield statutes are either outdated[164] or were flawed to begin with,[165] many argue that the entire system should be removed.[166] Reformation of the statutes is impossible,

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[160] *See* Tilley, *supra* note 71, at 78.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* at 80. ("[T]he law governing jury composition has changed significantly" and "women constitute half or near half of the jurors hearing rape cases today.").

[165] *Id.* (the goals of the feminist movement "cannot be realized in an artificial legal system that obscures the remaining divide over the question of whether sexual history is relevant to consent.").

[166] Tilley, *supra* note 71, at 80.

under this view, as they "were adopted based on invalid justifications" and are "obsolete today."[167]

While this argument has some persuasive appeal, I disagree on two points. First, the call for education is misplaced[168]—the need for education of the American public is undeniable, perhaps, but such education should not come at the expense of a rape victim's ability to prosecute successfully an attacker. Second, I find unconvincing Tilley's argument that reformation of the rape shield statutes is impossible—though the statutes may never be flawless, their existence is a concession to the public policy purpose of encouraging a victim to come forward.[169] Removing the statutes altogether irreparably frustrates this policy, out of a somewhat naïve belief that a greater good will result in the long run. The answer is not to remove *all* restrictions on admissible evidence, but rather to adopt the most sensible approach of the four models and hold it forth as a Model Act. This is what my proposed solution accomplishes by demanding that the law recognize the special nature of rape, but removing the extant ambiguity of "constitutional rights" by clearly delineating what is acceptable.

VI. CONTROLLING DISASTER: CONCLUSION

On February 3, 2005, Richard Matsch, the judge in the *Bryant* civil suit, berated attorneys on both sides for "filing titillating, unnecessary documents with the court."[170] Stating that the "court is not involved in the entertainment business," the judge reiterated that all "communications are to this court for rulings by the court," and that "they should not be a substitute for press releases."[171] Clearly, the legacy of *People v. Bryant* spilled over into the civil suit, and—in contrast to the first suit—the judge promised "that everything that is done here [will be] done consistently with the rules and with a sense of decorum and decency."[172]

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[167] *Id.*

[168] *Id.* ("[T]he judge should educate the jury and jurors should educate one another, the community, and government officials.").

[169] *See, e.g.*, Jeffries v. Nix, 912 F.2d 982, 986 (8th Cir. 1990) ("The rape shield law is an exception to the general rule that evidence with some relevance is generally admissible. The purpose behind the rule is to protect the victim's privacy [and] to encourage reporting of sexual assaults.") (citation omitted).

[170] Karen Abbot, *Matsch Lays Down Law: Judge Orders Lawyers in Bryant Rape Suit to Obey Court Rules*, ROCKY MTN. NEWS, Feb. 3, 2005, at A01, *available at* http://www.rockymountainnews.com/drmn/state/article/0,1299,DRMN_21_3519050,00.html.

[171] *Id.*

[172] *Id.* (noting that the judge has forbidden the filing of "depositions, interrogatories, requests for documents, requests for admissions and requests to enter upon land," as

This last point—the emphasis on decorum and decency—highlights once again the tension between the two sides in the rape shield debate. At the one pole argue those who feel that forced disclosure of sexual history robs the victim of both decorum and decency, making her relive the experience and dragging her reputation into the public arena.[173] At the other pole argue those who claim that the Constitution demands fair trials for the defendant, and that a fair trial cannot be had *without* admitting this evidence.[174] Decorum and decency necessarily fail when the Constitution commands.

Indeed, the Constitution does not demand just trials for innocent defendants, or for defendants who can make a fairly persuasive case concerning their innocence; rather, the Constitution mandates the same trial—and the same level of protections—for all defendants.[175] The natural extension of this is that even obviously guilty defendants must be treated as though they are not—this is the crux of "innocent until proven guilty."[176]

The rape shield statutes attempted to create a happy medium between the two poles: simultaneously recognizing that rape, as a particularly heinous crime, merits restrictions on admissible evidence, and also that the Sixth Amendment sometimes trumps these concerns. As a group, the statutes have been widely criticized as either unnecessarily restrictive or simply unnecessary. I argue for an admittedly slight modification of existing Federal Rule 412, in the hopes that the greatest criticism—that of irresponsible judicial discretion—may be eliminated, and the constitutional right to a fair trial may be obtained.

The *Bryant* case promised an explosion of legal theory, messy courtroom battles, and high public drama; the dismissal of the criminal trial and

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"publicity about it may affect public perceptions.") As the (final?) footnote to the Bryant narrative, a civil settlement was entered between the parties on March 3, 2005. Mullen, *supra* note 13. Experts believe that the total settlement exceeded $2.5 million, and the settlement included a confidentiality agreement. *Id.* A two-sentence statement was faxed to The Associated Press by Bryant's attorneys, stating that "the parties and their attorneys have agreed that no further comments about the matter can or will be made," and that the matter had been resolved "to the satisfaction of the parties." *Id.* Bryant has continued to play basketball and, nearly a year after the June 2003 incident, is once again doing Nike endorsements. *Kobe Bryant: Back in the Ad Game?*, July 8, 2005, CNNMONEY, http://money.cnn.com/2005/07/08/news/newsmakers/kobe_nike/.

[173] *See, e.g.*, DiFonzo, *supra* note 59.

[174] *See, e.g.*, Tanford & Bocchino, *supra* note 118.

[175] U.S. CONST. amend. VI ("In *all* criminal prosecutions, the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . . .") (emphasis added); U.S. CONST. amend VII (In *all* civil suits, "the right of trial by jury shall be preserved. . . .").

[176] *See, e.g.*, Martin v. Ohio, 480 U.S. 228, 230 (1987) ("[E]very person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt.").

confidential nature of the civil suit settlement, however, sent the case sputtering away and left these troubling issues unresolved. *Bryant* illustrates the ongoing legal debate regarding protection of the victim versus protection of the defendant. My wish is that this Note urges confrontation of the disaster that has been the rape shield statutes, in the hopes that a rape trial becomes what has always been intended: a vindication of justice through protection of the innocent.